

00328

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-158810

**DATE:** October 22, 1976

**MATTER OF:** Reimbursement of Third Party Costs of Search for and Producing Records Under Internal Revenue Service Summons.

**DIGEST:**

In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective January 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons.

The Commissioner of the Internal Revenue Service (IRS) has requested our decision as to whether the IRS may expend appropriated funds to reimburse third party witnesses for expenses incurred in searching for, reproducing, and transporting books, papers, records, or other data summoned by the IRS under 26 U.S.C. § 7602 (1970).

Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602 (1970), authorizes the Secretary of the Treasury or his delegates (authorized personnel of the IRS) to examine books, papers, records or other data relevant or material to an inquiry as to the liability of a taxpayer for any internal revenue tax. It also gives IRS authority to issue a summons to third parties, as well as the taxpayer, requiring them to appear and give testimony that may be relevant or material to such inquiries and to produce any necessary documentary evidence. If the witness does not comply voluntarily, a section 7602 summons may be enforced by a district judge, after a hearing, pursuant to 26 U.S.C. § 7604 (1970).

The Commissioner states that section 7602 investigative authority to obtain testimony and records by administrative summons is essential to IRS's ability to perform its statutory functions. However, the

Commissioner asserts that a major problem has arisen in recent years which has threatened to impair IRS ability to effectively administer and perform its functions. Increasingly, third party witnesses summoned to produce records have resisted the summons because of lack of reimbursement for expenses incurred by them in complying. It is noted that there are statutes which govern the reimbursement of witness fees incurred in administrative hearings, 5 U.S.C. § 503(b)(2)(1970), and 28 U.S.C. § 1821 (1970), but they are not applicable in this instance because they cover only fees and mileage to third party witnesses summoned by the IRS to give testimony at proceedings authorized under 26 U.S.C. § 7602, 48 Comp. Gen. 97 (1968); 49 Id. 666 (1977). Our present concern is with costs associated with the actual production of third party records under a § 7602 summons.

The refusal to comply with the summons forces IRS to initiate enforcement proceedings under section 7604(b) which are expensive and time consuming for the Government. Furthermore, IRS investigations are disrupted pending the outcome, dissipating both investigative time and personnel, which sometimes results in the expiration of civil and criminal statutes of limitation. Accordingly, the Commissioner requests our decision as to the use of appropriated funds for reimbursement to be made:

"(a) only to third parties (i.e., not to the taxpayer under investigation or officers, employees, agents, accountants or attorneys of the taxpayer); (b) served with an internal revenue summons; (c) to produce third party records (i.e., records not belonging to the taxpayer under investigation); (d) for reasonably necessary costs incurred in complying with a summons; (e) at rates set by the Service (e.g., records search: \$3.50 per hour per employee; photocopies: \$1.00 for first page, \$.10 for each additional page); (f) upon request and presentation of an itemized bill; (g) unless the Service (i) specifies that its own personnel will make the search, or (ii) specifies that it will provide its own reproduction equipment and supplies to make any necessary copies, or (iii) specifies production of only original summoned records. Reimbursement under such a program is to be in addition to, and not in lieu of, a summoned witness' existing right to witness and mileage fees under 5 U.S.C. § 503(b)(1970)."

B-158810

Concurrent with adoption of a reimbursement program it is also anticipated that a system of internal control procedures will be instituted providing for limitations on the dollar amounts for which various personnel are authorized to incur reimbursement obligations, higher level reviews where those amounts may be exceeded, and budgetary controls.

The Commissioner contends that because this proposed program is incident to the proper execution of the investigative functions of the IRS, it should be payable from IRS appropriations, citing the following language of the Treasury Department Appropriations Act, 1976, Pub. L. No. 94-91, August 9, 1975, 89 Stat. 441:

"For necessary expenses of the Internal Revenue Service, not otherwise provided for, including \* \* \* internal audit and security \* \* \* \$44,500,000.

\* \* \* \* \*

"For necessary expenses of the Internal Revenue Service for \* \* \* securing unfiled tax returns, and collecting unpaid taxes \* \* \* \$771,500,000.

\* \* \* \* \*

"For necessary expenses of the Internal Revenue Service for determining and establishing tax liabilities, and for investigation and enforcement activities \* \* \* \$830,000,000."

It is further argued that even though the expenses in question are not specifically enumerated in the appropriation language, such expenditures should qualify as "necessary expenses" within the above appropriation authority.

31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made. However, where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in

contravention of law or for some purpose for which other appropriations are made specifically available, 6 Comp. Gen. 619 (1927); 17 id. 636 (1938); 29 id. 419 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973). The question is therefore whether the proposed reimbursement of third parties for reasonably necessary costs incurred in complying with an IRS summons to produce third party records is necessary to carry out IRS's statutory functions.

In the course of our consideration of the Commissioner's submission, we learned that the Congress was considering a provision in section 1205 of the Senate passed version of H.R. 10612, 94th Congress, which would specifically deal with the issue at hand. With the informal concurrence of IRS, we delayed our decision pending congressional action. On October 4, 1976, the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1702, was enacted containing in section 1205 thereof a provision which would authorize the IRS to reimburse witnesses for the costs of complying with administrative summonses. Under these provisions the IRS is required to pay per diem and mileage costs when a witness is required to appear in response to a summons and would authorize the IRS to reimburse a summoned party (other than the taxpayer) for direct costs incurred in locating, copying and transporting any summoned records. Such payments and reimbursements are to be made at rates, and subject to such conditions, as may be prescribed in regulations. This measure will give authority to the IRS to make the reimbursements requested here. However, this measure would only be applicable to those summonses issued after December 31, 1976.

IRS subsequently advised us that it still needed a decision to deal with any summonses issued prior to January 1, 1977. For the reasons discussed below, we will not object if the IRS institutes a limited reimbursement program.

The judicial precedent for reimbursing third party witnesses for searching, producing and transporting documents required by IRS under a duly issued summons is ambiguous. Courts have required IRS reimbursement of third parties summoned to produce documents under § 7602, for the reasonable costs of compliance. See Friedman v. United States, 532 F.2d 928, 937 (3rd Cir. 1976), in which it was stated that the application of this rule requires consideration of the specific facts of any given case and could not be made subject to a general rule. In United States v. Davey, 426 F.2d 842, 845 (2nd Cir. 1970), the Court

B-158810

stated that the Government has a right to require the production of relevant records so long as it pays its reasonable share of the costs of retrieval. See also, United States v. Farmers & Merchants Bank, 397 F. Supp. 418 (C.D. Cal. 1975), appeal pending (No. 75-3690, 9th Cir.); United States v. Davey, 404 F. Supp. 1283 (S.D. N.Y. 1975), appeal pending (2nd Cir.). Other cases have indicated that the IRS would not have to reimburse third parties for the production of documents when the costs of production claimed by the summoned persons were not unreasonable or burdensome. See United States v. Continental Bank & Trust Co., 503 F.2d 45 (10th Cir. 1974), in which the Court stated that although the direct costs to the bank would approximate \$1,500, the summons did not impose an unreasonable financial burden on the bank. In United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 130 (3rd Cir. 1967), cert. denied, 390 U.S. 921 (1968), the Court stated that there is "no doubt that the recipient of a summons has a duty of cooperation and that at least up to some point must shoulder the financial burden of cooperation \* \* \*." The bank in that case had refused to cooperate at all with the IRS. Compare also, United States v. Jones, 351 F. Supp. 132 (M.D. Ala. 1972) and United States v. Maryland Bank & Trust Co., 76-1 USTC 83,570 (D. Md. 1975). In other words, no consistent principle on a third party's entitlement to fees for producing records has been set forth by the courts.

However, in somewhat similar circumstances, this Office has determined that the Government is authorized to reimburse third parties the reasonable costs of complying with administrative proceedings, when such compliance is considered necessary to the Government. In 43 Comp. Gen. 110 (1963), we found that it was within the discretion of the Securities and Exchange Commission to reimburse the First State Bank of Abilene, Texas, which was not a party in the proceedings, and to whom a Commission subpoena duces tecum was addressed, for the reasonable processing expenses incident to the preparation of the reproductions of microfilm records. In 8 Comp. Gen. 19 (1928) and 1 id. 442 (1922), we recognized that expenses incurred by a third party in complying with a subpoena duces tecum issued on behalf of the Government may be paid on the basis that such expenses are necessary and incident to the procurement of the documentary evidence called for by the subpoena and needed by the Government.

In view of these decisions we hold that when IRS determines that it will avoid costly litigation and delays in obtaining necessary

B-158810

documents from third parties by doing so, it may enter into an agreement with those parties to pay the reasonable costs of complying with the IRS summons. After January 1, 1977, the effective date of section 1205 of the Tax Reform Act of 1976, the IRS will, of course, be governed by the terms of the reimbursement authority set forth therein.

Deputy

  
Comptroller General  
of the United States